SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 792

CLYDE WILKERSON,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, as Trustees of The Denver and Rio Grande Western Railroad Company, a corporation,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

WALDEMAR Q. VAN COTT,
DENNIS McCARTHY,
Attorneys for Respondents.

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STATEMENT OF THE CASE

Petitioner's statement of the case is argumentative and incomplete. Since the only question presented by the petition filed in this case is the propriety of the ruling of the trial

court directing a verdict in favor of the respondents, it is considered necessary to set forth the facts in some detail:

This was a suit for damages on account of personal injuries sustained by petitioner at about 10:30 a. m. (R. 40), on July 26, 1945, as a result of a fall into the wheel pit located in the respondents' railroad coach yard at Burnham, in Denver, Colorado. Petitioner was employed as an engine foreman (R. 31) on the 7:00 a. m. to 3:00 p. m. shift (R. 32). His work crew included himself, two switchmen, an engineer and a fireman. Their duties consisted of general passenger car switching in the yard, making up trains, and spotting "bad order" cars for repair (R. 32).

The accident to petitioner occurred within an area enclosed by safety chains and posts on three sides, and by a standard Pullman tourist car on the fourth. The wheel pit was located inside this enclosure. It was constructed in 1942 (R. 73), and consisted of a rectangular shaped pit, 4 feet 2½ inches wide, 10 feet 7 inches deep, with concrete walls, the tops of which were flush with the level of the ground (R. 57, 61). The pit ran underneath three or more parallel tracks with the long axis of the pit approximately east to west and the tracks crossing it from north to south. These tracks were identified as the Wheel Track, on which wheels were brought to and taken away from the pit, and the track next east, known as Track 23½, on which cars were brought to the pit and "spotted" for repair (R. 15, 16).

The safety chains and guard posts surrounding the wheel pit were installed about May 1, 1945, less than three months prior to petitioner's accident (R. 80). When open and in use, the posts and chains enclosed the pit on three sides, north, south and west, by means of four corner posts and a connecting chain, and on the fourth or east side by whatever passenger car happened to be spotted for repair over the pit on Track 23½. The four chain posts were 42 inches in height and fixed in sockets. The safety chain stretched between the posts and fastened 2 inches below the top of the posts or 40 inches above the ground (R. 62). The east chain posts were located 36 inches west of the west rail of Track 23½, and from less than

1 inch to not more than 7 inches from the outside edge of the overhang of whatever car was spotted over the wheel pit. The west chain posts were 16 feet 5½ inches west of the east chain posts, and the distance between the north and south chain posts was 7 feet 6 inches (R. 62).

When the pit was in use, all the cover board for the pit would be removed, except one so-called "permanent board" which was left in place and never taken out. This particular board was made up of several planks bolted together. It was 22 inches wide, 4 feet 2½ inches long, and weighed 75 pounds (R. 57). This board would fit across the pit only at one particular point. The east edge of the board was 9½ inches west of the east safety chain posts or 45½ inches west of the west rail of Track 23½ (R. 57, 64). The carmen assigned to work in the wheel pit required the use of this board in its particular position in their work of changing wheels on the cars spotted over the pit (R. 68-69, 73-74). The board acted as a support to the carmen in getting down in the pit to the hoist located on the pit floor (R. 74); it was used also as a means of getting in and out of the pit (R. 58, 74, 85), as a brace, and if carmen were taking off nuts and bolts while working on a car, the board kept them from falling backwards into the wheel pit (R. 74, 87-88).

This board fitted firmly over the pit (R. 57, 84). At each end of the board there was a steel lip of Z-iron construction (R. 57-58). The Z-iron was secured by a strap of iron over both the top and bottom sides of the board (R. 57-58). The steel lip fitted over the edge of the cement wall of the wheel pit, so as to make it level with the top of the pit wall and the ground (R. 58). The board fitted tight and snug (R. 58, 75); it had no play or wobble in it (R. 75). This board was just a little bit longer than the other boards, so as to make it fit a little tighter because of the fact that the board was used as a brace by the carmen (R. 74, 87-88).

When a car was spotted over the wheel pit on Track 23½ and the safety chains and posts were up and in place, the wheel pit was completely enclosed, except for the narrow space between the east safety chain posts and the side of the

car spotted on Track 23½. The width of this space would vary according to the width of the overhang of whatever car happened to be spotted over the pit—some cars having a wider overhang than others. At the time of the accident to the petitioner, a standard Pullman tourist car was spotted over the pit. If a plumb bob were dropped vertically from the west side of that car to the ground, the distance between the line and the base of the east chain post would be 5 inches and would increase to 7 inches at the top of the post, since the post leaned slightly outward (R. 59). When passenger equipment with a wider overhang was spotted over the pit, the space between the side of the car and the nearest post would be reduced as much as 2 to 6 inches (R. 59-60).

Only one shift of carmen worked at the wheel pit, and that was the day shift (R. 103), whose hours were from 8:00 a. m. to 4:00 p. m. (R. 81). When a car was spotted over the wheel pit for a wheel change, the pit was uncovered and the guard posts and safety chains were put up around the open pit (R. 63, 86). In order for the carmen to perform their work of changing wheels, it was necessary for the entire pit to be open except for the so-called permanent cover board located 9½ inches west of the west rail of Track 23½ (R. 57, 63, 64). Sometimes also, another board 19 inches wide, immediately adjoining the west rail of Track 23½ was left in place (R. 63). The open space between the edges of these two boards would be 22 inches (R. 71). The board adjoining the rail would be taken out or left in place, depending on the repair work being done at the wheel pit (R. 63), but when a car was spotted over the wheel pit, this board next to and adjoining the rail would be completely covered by the overhang of the car (R. 53).

When carmen were not working at the wheel pit, the chain posts and safety chains were removed, all the cover boards were fitted in place, and the pit was completely covered (R. 16, 19-20, 64-65). At such times people would walk back and forth over the cover boards on the pit; it was perfectly safe and proper to do so (R. 20-21).

The injury to the petitioner occurred at a time when the wheel pit was open and all the cover boards were removed except the board immediately adjoining the west rail of Track 23 and the "permanent" board west of the east chain posts (R. 62, 82-83). Carmen were working on the car spotted over the pit (R. 44). The safety chains were up around the wheel pit (R. 36, 44). Petitioner entered the chained area traveling from north toward the south (R. 45, 83). He put his right hand on top of the chain post nearest the car, turned his body sideways so that he faced west, slid through the 5 to 7 inch space between the car and the chain post, and swung his body around the post. He then moved a few inches to the west along the north edge of the pit, turned around and stepped onto the board west of the east chain posts with his right foot (R. 46). He fell into the wheel pit toward the west from the west side of the board (R. 50).

Just before the accident occurred, petitioner had been in the Battery House for a drink of water. The Battery House is located to the north of the wheel pit (R. 40). Petitioner stated that he wanted to secure certain "information" from the carman, Mr. Hawkins, and his helper, who were working on the tourist car spotted over the wheel pit. He admitted that there were several different ways that he could have secured this information, without crossing the board within the area surrounded by the safety chains (R. 43-46). During the trial when asked if it wouldn't have been quicker for him to have gone over or under the safety chains, petitioner replied that the chain was too high at the post to go over, that one would "have to crawl under." When asked why he didn't go over or under the chain, he answered, "because I didn't want to. It wasn't necessary for me to go over the chain" (R. 53-54). At still another point, petitioner conceded that the purpose of the guard chains was to keep people from walking or falling into the open pit (R. 101).

The evidence concerning the claimed use of the cover board by switchmen consisted of testimony by Gordon H. Arbogast and by the petitioner, himself. Arbogast's work

shift at the yards was from 3:00 p. m. until 11:00 p. m., while the shift of the carmen who worked at the wheel pit extended from 8:00 a. m. until 4:00 p. m. So that between Arbogast's shift and the shift of the carmen at the wheel pit there was an overlap of but one hour (R. 19). On direct examination, Arbogast stated that he had observed a practice of switchmen and workmen passing between the safety chain posts and a car standing on Track 23½ (R. 17), but when asked to state the practice, his answer apparently referred to the admitted use made of the cover board by carmen during their work at the wheel pit (R. 17). Arbogast admitted on cross examination that his testimony as to the occasions when men would cross the pit was subject to the limitation that during most of his shift, the carmen were off duty and the safety chains and posts were removed and the pit was entirely covered over (R. 21). At such times people walked back and forth across the boards over the pit and it was perfectly safe and proper to do so (R. 21). Arbogast also stated that he wouldn't dispute the fact that the safety chains and posts were installed around the first part of May 1945, less than three months before the petitioner's accident, and his testimony also would be subject to that limitation (R. 22). In his previous testimony as to the occasions when men would cross the board, he had referred to occasions before the safety chains and posts were installed, and so his testimony also would be subject to that limitation (R. 22). As rebuttal, Arbogast testified that since the installation of the safety chains at the wheel pit he had seen two switchmen, whom he named, pass over the cover board (R. 103-104). According to Arbogast, the reason it was necessary to cross the cover board between the safety chain posts and the car was because otherwise "you would have to walk all the way around the pit, you understand, and poor old switchman that is working there is plenty tired, he don't feel like making lot of extra steps" (R. 15).

The petitioner testified that he had observed "men that work around there, regardless of whether switchmen or carmen," pass over the board when the chains were up and a car was standing over the pit on Track 23½ (R. 37). He first

spotted the tourist car on the wheel track about an hour and a half before his acident on the same morning (R. 101). At that time he crossed the board between the car and the safety chain posts, walking from the south towards the north (R. 37). At that time he saw grease on the board (R. 39), but the board seemed perfectly safe and secure (R. 101). It did not wobble and wasn't infirm; it seemed solid (R. 101). Later that morning at the time of his injury, when he started to cross this board, it felt like there was a pebble or a rock under it (R. 49). But he didn't see a pebble or rock; he didn't examine the board (R. 49). So his statement about a pebble or rock under the board would be just a guess (R. 49). As he began to cross the board, he "just glanced at the position of the board" (R. 98). He noticed one little spot of grease on the board (R. 98), but didn't know whether he slipped on that particular spot of grease or not at that time (R. 99). He didn't notice that he ever stepped into the grease, or whether he really got into the grease (R. 99). He couldn't swear as to whether his foot slipped in the grease (R. 100). He didn't see any grease on the board before he stepped on it, but there was some grease on it (R. 101). As near as he could recollect, the east edge of the board was 10 or 12 inches west of the east safety chain posts (R. 47), at the time he attempted to cross it.

ARGUMENT

I.

THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT MAKE THE EMPLOYER THE INSURER OF THE SAFETY OF HIS EMPLOYEES.

For the most part, petitioner's argument in support of his petition for writ of certiorari is devoted to general assertions that there was evidence for the jury on the issue of whether respondents were negligent, and to the citation of a large number of cases decided by this Court in which the necessity of a jury trial has been emphasized unless there is an "absence of probative facts to support the conclusion" reached. It is respectfully submitted that a review of the evi-

dence in the present case will withstand the most rigorous standards laid down by this Court.

The underlying refrain of the petitioner's argument is that because the trial court directed a verdict, petitioner has been denied his "constitutional right" to a jury trial. In other words, in the opinion of petitioner's counsel, *all* Federal Employer Liability Act cases must be submitted to a jury and respondents are, in effect, the insurers of the safety of their employees and subject to an absolute liability. This Court has expressly rejected this contention on numerous occasions. For example, in the recent case of *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, the Court cited the controversial case of *Griswold* v. *Gardner*, 155 F. (2d) 333, (C. C. A. 7th), and expressly rejected the viewpoint therein expressed, in the following language:

> "The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law."

In view of the petitioner's contentions in the case at bar, the Court's ruling in *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, is especially pertinent. In that case the plaintiff, a brakeman, was injured in a switching movement, in which a freight train was derailed while backing over a closed derailer. Among the acts of negligence alleged against the defendant was the failure to provide a reasonably safe place to work because of alleged defects in the track and derailer. Expert testimony was introduced to the effect that the rail opposite the derailer was so worn that it caused the wheels of the train to rise over the "wrong end" of the derailer, and thus derail the train, which would not have been the case "nine times out of ten if the best type" rail had been in use. Moreover, with reference to the likelihood of cars passing over the wrong end of a derailer, one witness testified that he recalled 3 or 4 such instances, and the Superintendent of the Railroad testified it happened very frequently, that he had seen it happen 25 to 50 times. The Court conceded that the

evidence as to the defective condition of the rail would justify a finding for the plaintiff, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the closed derailer was a danger reasonably to be foreseen or anticipated, but *held* that the evidence as to the likelihood of such an occurrence was not sufficient to impose a duty upon the Railroad to foresee such an event and guard against the misuse of the derailer. The court said:

> The Supreme Court of North Carolina (222 N. C. at page 370, 23 S. E. 2d at page 338) was of the view that striking a derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. Milwaukee, etc. R. Co. v. Kellogg, 94 U. S. 469, at page 475, 24 L. Ed. 256: "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been forseen in the light of the attending circumstances." Events too remote to require reasonable prevision need not be anticipated. It was so held as to an intervening embargo after a delay in transit which was caused by negligence. (Citations.) Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 63 S. Ct. 444, 450, 143 A. L. R. 967. Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. Decedent had first closed and then opened the derailer on the first movement. He signalled the train to back into the storage track just before the fatal accident. Although this misuse of the derailer was an act of negligence, it

> is mere speculation as to whether that negligence is chargeable to the decendent or another. Without this unexpected occurrence, the adequacy of the rail vis-a-vis a properly used derailer is unquestioned. It was entirely disconnected from the earlier act of the carrier in placing the weak rail in the track. The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

This Court is, of course, solicitous of its duty of protecting all the rights of all litigants, particularly fundamental rights guaranteed by the federal statutes and the Constitution. But the Court repeatedly has said that the right to have a jury pass upon issues of fact does not include the right to have a cause submitted to a jury in the hope of a verdict where the facts undisputably show that the plaintiff is not entitled to relief. As herein demonstrated, such is the present case.

II.

THE PHYSICAL FACTS AND UNDISPUTED EVIDENCE ESTABLISH NO DUTY ON THE PART OF RESPONDENTS TO ANTICIPATE OR FORESEE THAT THE PETITIONER WOULD CROSS THE WHEEL PIT WITHIN THE AREA ENCLOSED BY THE SAFETY CHAINS.

It may be assumed for the purpose of argument that at the time of his injury, the petitioner was enroute to get certain "information" desired in connection with his work, even though the evidence discloses no necessity for any such mission (R. 43-46, 81, 83). Still the pertinent question is: Was it reasonably foreseeable that the petitioner would squeeze between the guard posts and the side of the car spotted over the wheel pit and attempt to cross the wheel pit by means of the board located within the area surrounded by the safety chains? It is respectfully submitted that both the physical facts and the uncontradicted evidence provide a forceful negative answer to this query.

The physical facts and evidence.

Respondent's Exhibit 2, consisting of a scale model of the wheel pit, safety chains and posts, tourist pullman car on Track 25½ and various other tracks referred to during the trial, is part of the evidence and the record in this case (R. 13). The scale of the model is one foot to a quarter of an inch (R. 13). This model, itself, demonstrates more convincingly than any argument of counsel that the area within the chained enclosure was a restricted territory. Any school child knows that an area thus surrounded by safety chains is a forbidden zone. A railroad man, accustomed to working in hazardous areas, is even more aware of the meaning and warning significance of such a chained enclosure. As is apparent from the model, there is no practicable way that the respondents could have made the area within the chains a safe passageway for switchmen and other employees such as petitioner except by eliminating the wheel pit. Even the petitioner has not suggested this alternative.

The uncontradicted evidence is that the petitioner knew and appreciated the significance of the safety chains and guard posts surrounding the wheel pit. On cross examination he stated the following:

> Q. Mr. Wilkerson, what are these guard chains up here for in your understanding?
>
> A. To keep people from walking directly into the open pit.
>
> Q. Keep people from falling into the pit?
>
> A. Yes sir. (R. 101.)

Equally revealing is the explanation by petitioner's witness Arbogast, as to the necessity for crossing the board by sliding sideways between the safety chain post and the car, because otherwise, he said, "you would have to walk all the way around the pit, you understand, and poor old switchman that is working there is plenty tired, he don't feel like making lot of extra

steps" (R. 15). Actually the "extra steps" would total about 40 feet, taking into consideration the width and the length of both sides of the chained enclosure.

Moreover, the testimony of petitioner shows conclusively that it was not reasonably necessary for him to enter the chained area of the wheel pit in the performance of his work. Other safer and more efficient routes were readily available. When he had walked down on the west side of the car just before his accident to a point just north of the chained enclosure, he could hear the carmen talking under the car. He did not ask the carmen at this point for the "information" he desired, although he conceded that he could have asked them (R. 45). Furthermore, he could have gone around the north end of the car on Track 23½ and down on the east side of the car to the point where he knew the men were working under the car (R. 45) and secured the desired "information." Even after he had gone down on the west side of the car, and had decided he would go around to the other side of the car where he heard the carmen talking, he could have gone around the west end of the wheel pit, outside the chains, and around the south end of the car and then to the east side of Track 23½ (R. 46). Petitioner also conceded that he could have waited for the removal of the blue flag by the carmen, which would have signaled the fact that the carmen were through with their work and the car could be moved off the wheel pit (R. 44). When asked why didn't go over or under the safety chains, petitioner's petulant answer was, "because I didn't want to" (R. 54).

Instead of availing himself of these other apparent means and routes, the petitioner entered the chained area and attempted to cross the wheel pit by means of the narrow opening between the side of the car and the safety chain posts next to and just west of the car. The space was only 5 to 7 inches wide. Passenger equipment with a wider overhang of from 2 to 6 inches also was spotted over the pit for repair (R. 59), and on such occasions the space between the side of the car and the east chain posts would be entirely filled. All of the

witnesses at the trial agreed that at best, it would be a tight squeeze for a man to pass between the side of a Pullman tourist car and the chain post. Petitioner admitted that it was necessary to turn sideways in order to get through (R. 46). Arbogast said that it not only was necessary to turn sideways, but also described how he would "crawl through there now" (R. 23), and at still another place referred to the performance as one where you "slide through" (R. 24). Carman Hawkins, a larger man than petitioner or Arbogast, confirmed the fact that for him it would be a gymnastic accomplishment; there was a possibility it could be done, but it would be a discomfort (R. 96-97).

When the carmen were working at the wheel pit changing wheels and repairing cars it was necessary for the wheel pit to be open and the cover boards removed in connection with their work (R. 61, 68-69, 74). The one exception was the partciular board from which petitioner fell. This board necessarily was kept in place and never removed (R. 87-88), because the carmen needed this board to cross on during their work of removing and applying wheels to passenger cars (R. 74), as a support in getting down on the hoist located on the floor of the wheel pit (R. 74), as a means of getting in and out of the wheel pit (R. 58, 74; 85) and as a brace in case a carman should slip or fall (R. 74, 87-88). It is not disputed that the wheel pit itself was a necessary construction used in connection with the respondents' railroad business, or that the area of the wheel pit was in all respects proper, so far as engineering design and construction were concerned.

How could the respondents possibly have made the area of the wheel pit safe as a passageway for switchmen such as the petitioner? Fully aware of the difficulties of such an undertaking, respondents did the safest thing conceivable under the circumstances—they blocked off the area. By installing the safety chains and posts as a warning, this particular area was zoned off as effectively as was humanly possible consistent with the use made of the wheel pit. The petitioner's counsel obviously realize the difficulty of their position when they attempt to list on pages 31 and 32 of

their brief the various things which respondents might have done in order to make the area within the chained enclosure safe for the petitioner. Although none of these assorted "suggestions" were mentioned in petitioner's complaint or referred to during the trial, the list might be appropriately augmented by the suggestion that the respondents could have stationed guards armed with shotguns and clubs in the vicinity of the safety chains.

No allegations or sufficient evidence to impose notice on respondents with respect to any misuse of the cover board.

Since the area of the wheel pit had been blocked off on May 1, 1945 by the erection of guard posts and safety chains and excluded as a place of work for all persons except carmen who repaired the cars spotted there for that purpose, the petitioner attempts to rescue himself from the force of this situation by pointing to a claimed practice of switchmen crossing the wheel pit subsequent to the installation of the chains and posts. Such a practice, argues the petitioner, imposed notice upon respondents that the cover board was being used as a walkway for a sufficiently long period of time to justify the presumption that respondents consented to or acquiesced in such use.

At the outset, it should be pointed out, that the complaint filed in the trial court is completely devoid of any allegations of negligence such as suggested. The complaint contains no reference either to custom or practice or to any actual or implied notice thereof. Moreover, even if custom and practice were properly pleaded and the evidence thereof relevant under the issues framed, the so-called evidence of misuse of the cover board relied upon by the petitioner in this case falls far short of showing a custom that had existed "so openly and habitually and for a long enough period of time to raise the presumption that the respondents or those appointed by them had consented to the use or acquiesced in it."

In the first place, it should be kept in mind that the safety chains and posts were installed less than three months prior

to petitioner's accident. So that in any event, it cannot fairly be said that a practice was "well established" or "long continued." The evidence relied upon with respect to the so-called custom is contained in the testimony of the petitioner, himself, and of his witness Arbogast. Under questioning by his own counsel, petitioner testified as follows (R. 38):

Q. I will ask you to state whether or not you observed any practice with refernce to crossing over the pit when men were working on the cars there in the daytime before these chains were installed?

A. Walked right straight across the board.

Q. Was there a board usually there to walk over?

A. Yes, sir.

Q. Was there any change in that practice after the chains were installed?

A. None, only they had to walk around the chains.

Q. At any time while you were working in the yards there before you were injured, did you ever receive any instructions from anyone forbidding you to cross over the pit?

A. No, sir.

Q. You may state whether or not you observed men cross over the pit as you have indicated here on more than incidental occasions.

A. Yes, sir.

Q. What did you observe with reference to the number of times the occasions when men would cross over the pit?

A. Oh, I couldn't say; I suppose maybe a hundred times; varies, men, both switchmen and car men or others working there in the yard necessary, pullman, employees and so forth.

Q. Crossed over the pit?

A. Yes, sir, it was a common practice for everybody to use that that way.

As pointed out in the opinion of the Utah Supreme Court, the foregoing testimony is in no way limited as to dates or employees. The petitioner could have been talking about the time before the chains and guard posts were installed, the time after the chains were installed, or both. Also, there is no way of telling how much of the alleged use was by the carmen who must necessarily use the board in connection with their work at the wheel pit, and how much of the claimed use was by other employees such as switchmen.

The other witness Arbogast, attempted several times during the course of the trial to give evidence regarding a supposed custom and practice, but as a witness on rebuttal concluded his testimony in this manner under questioning by petitioner's counsel (R. 103-104):

Q. During the period of time between the installation of these safety chains and posts and the time when Mr. Wilkerson was injured, I will ask you to state whether or not you ever passed over that board at the west of the post by passing between the post and the standing car while that crew was there working?

A. *Yes, sir, I remember of two occasions that I passed through there.*

Q. During that period of time?

A. Yes, sir.

Q. Have you seen any other switchman working there in the yards act similarly; that is, go around the post, between the post and the car and pass over the board?

A. Yes, sir, I have saw my helpers at different times and before the chains were placed, we used the

board at all times, you know, just to cross the pit. I have walked across the pit a number of times that way, and also my helpers.

Q. I am interested in the occasions when the board had been crossed after the chains were installed.

A. *Yes, sir, I have saw fellow by the name of Mason and fellow by the name of * * * that helped me quite a long time.*

Q. They were switchmen?

A. Yes, sir, that crossed the board.

Q. Crossed the board while car was standing over the wheel pit. Did they cross while a car was standing in the wheel pit?

A. Yes, sir.

Thus Arbogast's testimony with respect to claimed custom and practice was left at the low score of two—i. e., two switchmen whom he had seen cross over the board after the safety chains were installed. Usage by employees other than the two is confused between the times before and the times after the installation of the safety chains. Certainly, such evidence is entirely lacking in those elements necessary to show constructive notice of an established custom and practice by acquiescence. It is apparent from all the testimony at the trial that there was no "well established and long continued practice" for switchmen such as petitioner to cross the cover board within the area of the safety chains. Of course, the carmen who repaired cars at the wheel pit necessarily used the cover board in connection with their work, but all of the carmen testified that no one other than themselves had ever been seen using the cover board as a walkway (R. 62, 79, 86, 91). As stated by the Utah Supreme Court in summarizing the foregoing evidence, it "at the most, established a questionable, sporadic and occasional use of the board in the manner contended for, * * * and for a short period of time." This was not sufficient to charge respondents with notice of an unsafe practice.

See also:

Waller v. *Northern Pac. Terminal Co.*, 178 Or. 274, 166 P. (2d) 488, cert. denied, 329 U. S. 742, 67 S. Ct. 45;

Lasagna v. *McCarthy*, ... Utah ..., 177 P. (2d) 734, cert. denied, 332 U. S. ..., 68 S. Ct. 205.

Petitioner seeks to impose a duty on respondents impossible of fulfillment.

There is still a further difficulty in the petitioner's argument and position. If it be assumed contrary to the facts that notice and acquiescence were properly alleged in petitioner's complaint and established by competent evidence, the question is then presented what could or should the respondents have done under the circumstances. Surely, the law does not impose a legal duty which as a practicable matter is impossible of fulfillment. By the soundest and most sensible scheme possible, consistent with the continued use of the wheel pit, the respondents had removed the area within the safety chains from the category of a work place for everyone except carmen. Other employees were excluded by the obvious physical features, including the warning safety chains. Even in the face of explicit notice of habitual violations of the express warning conveyed by the presence of the safety chains, what other reasonable precautions could the respondents have taken? By its inherent nature and design the area of the wheel pit could not have been made safe as a thoroughfare for all of the employees working in the respondent's yard, without dispensing with its necessary function. The law does not impose a duty to make safe that which by its very nature cannot be made safe.

A case directly in point is *Freeman* v. *Garretts*, (Sup. Ct. Texas) 196 S. W. 506. In that case a railroad employee was injured while attempting to mount the brake beam of a box-car being backed toward him to be coupled to another stationary car upon the track. The plaintiff was standing

within the track as the car slowly approached him; when it reached him he caught hold of the grab iron at the end of the car and placed his left foot upon the brake beam. The brake beam shifted to one side throwing his right foot into such a position that it was caught by the car wheel and injured. Plaintiff's purpose in attempting to get up on the brake beam was to ride the car and open the knuckle of the coupler upon it, whereby the coupling with the stationary car could be made. The negligence charged was a defective condition of the brake beam which permitted play to the side, preventing the plaintiff from safely mounting it. Evidence was introduced by the plaintiff of a habitual practice by brakemen of mounting the brake beam from within the track of an approaching car. There also was proof of an express rule by the defendant employer prohibiting the use of the brake beam for such purpose. But the plaintiff contended that the evidence as to habitual use amounted to notice of the practice to the defendant, that therefore the defendant was under the duty of exercising care to see that the brake beam was maintained in proper condition so that it safely could be used by brakemen for this purpose. The case was submitted to the jury upon this theory.

In reversing the judgment of the lower court, the Supreme Court held:

> * * * The plaintiff could have performed the particular duty without getting on the brake beam—either by running ahead the slowly moving car and adjusting the knuckle before it reached the other car, or by giving a signal and causing the car to be stopped while he adjusted the knuckle for the coupling.
>
> It was not possible, in our opinion, for this brake beam to be kept in a condition which would render it safe as a place for one standing upon the track to mount an approaching car. * * * It was plainly a highly dangerous instrumentality for the use which the plaintiff sought to make of it,—a use for which it was in no sense designed, and to which it could not be safely

adapted, however perfect its condition as a brake beam. To say that the defendant was under the duty of keeping such an instrumentality safe as a place to mount an approaching car, would practically require the impossible. The law, with all its regard for the rights of others, does not exact the impossible of any man. It is supposed to be founded upon reason and fairness. Unless it possesses inherently those elements, it does not deserve the name of law and is not the law. It would be manifestly unjust to hold anyone to the duty of making an appliance safe for a given purpose, which, whatever the prudence exercised, could not be made safe for that purpose. We think this is true of a brake beam attempted to be used as the place for mounting an approaching car; and we therefore hold that negligence could not be predicated upon the defendant's failure to make this brake beam safe for such use by the plaintiff upon the occasion which caused his unfortunate injury.

It is a universal rule that an employer is not liable for an injury to the employe which results from the latter's putting an appliance to a wholly improper use. It is recognized that this rule is, in general, subject to qualification where it appears that it was customary for the appliance to be put to the improper use and the employer knew of such custom. But this qualification can have no application to an appliance which is not only wholly unsuited for the improper use which causes the injury but is one which, from its nature, cannot possibly be made safe for such use.

* * * With evidence of the existence of an express rule forbidding the use of a brake beam as the means of mounting an approaching car,—a rule manifestly intended for the protection of the employes,—we decline to hold that even its persistent violation would serve to impose upon the defendant a duty which he could not in reason discharge, and which, if performed

to the fullest possible extent, would in its substantial operation compel him to invite injury to his employes.

If there were anything in this case showing that the plaintiff was required by the defendant to use the brake beam for the purpose to which he attempted to put it, the elements of actionable negligence would be fully presented. But such is not the case. The plaintiff's attempted use of it was purely voluntary, and, as found by the Court of Civil Appeals, its use was not necessary to the work in which he was at the time engaged.

In the case at bar, the wheel pit which petitioner attempted to cross by means of the cover board was obviously and inherently a dangerous place, a place in no sense designed or adapted to the use which petitioner sought to make of it. There were many other equally convenient and efficient routes which petitioner could have used to perform his duties. The wheel pit could not be made safe for the purpose of a thoroughfare for switchmen such as the petitioner. In recognition of this fact, the respondents had installed guard posts and safety chains around the area of danger, comparable to the express safety rule promulgated by the employer in the *Freeman case*. In the case at bar, as in the *Freeman case*, the employee seeks to impose a legal duty upon the employer to make safe that which by its nature could not be made safe, by contending that there was a custom and practice of using the instrumentality in the manner in which the petitioner was using it at the time he was injured. This, the court refused to sanction in the *Freeman case*, on the ground that even evidence of persistent habit and custom of improper use would not serve to impose a duty upon the employer which he could not in reason discharge, and which even if performed to the fullest possible extent would in its actual operation compel the employer to invite injury to his employee.

The evidence makes clear that the carmen who did repair work at the wheel pit required the use of the "permanent" board in its particular location in order to perform their

necessary duties, as was true of the structure of the wheel pit and its appurtenant equipment. So also the particular location of the warning chain and chain posts was necessary in order not to interfere with the car repair work carried on at the wheel pit. Under these circumstances, how could a safe passageway for all persons in the railroad yard be created over the wheel pit? It was a place of obvious danger; the pit was of considerable depth, lined with concrete, and contained hoisting machinery. There would be no feasible way of making this complicated and dangerous area into a passageway safe for general use, without destroying the very purpose of the wheel pit.

The several cases cited by petitioner miss the point. The case of *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 64 S. Ct. 598, is not in point for the reason that in that case there was conflicting testimony and inferences as to whether the petitioner had been furnished a safe place to work and as to whether an engineer had acted negligently. The petitioner was caught during a switching operation between a box car and the side of a building in a space where there was an impaired clearance. At the point where the accident occurred "the situation was deceptive because the overhang of the car on the curve and its tilt toward the building resulting from a higher outside rail, reduced clearance materially. In fact, the place where petitioner was standing was the one short segment of the arc of the curve where clearance was insufficient. Petitioner was unfamiliar with the area and its hazards; if there was a sign warning of the danger, he did not see it." There was evidence that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stopping the engine. In view of these facts, the Court held that the issues should be submitted to a jury. In the case at bar, however, no evidence of either a deceptive condition, unfamiliarity with the area or hazards, lack of warning, or negligence upon the part of a fellow employee are involved. On the contrary, the area where the accident occurred and its hazards was well known to the petitioner and the existence of the safety chain was

a patent warning of which the petitioner knew and appreciated the significance. Under the circumstances, it could not reasonably be anticipated that petitioner would ignore the warning, attempt to slide around the erected barrier and negotiate his way over the board within the chained area.

The cited case of *Winnegar* v. *Oregon Short Line R. Co.*, 77 Utah 594, 298 P. 948, does not remotely resemble the case at bar. In that case, the plaintiff, a car inspector, was injured when struck by a cut of cars which was unexpectedly and without warning "kicked" into a track adjoining where plaintiff was working. In his complaint, the plaintiff alleged that the defendant was negligent in failing to give warning of the movement contrary to a custom and practice to do so. Defendant denied the existence of any such custom of warning and conflicting evidence thereof was introduced by both sides. The court properly held that the disputed issue should be resolved by the jury. In the case at bar on the other hand, the question involved is not whether there was a negligent operation of cars by a train crew, but whether under the physical facts and undisputed evidence the petitioner's accident was reasonably foreseeable, and also whether there was sufficiently substantial evidence of the claimed misuse of the cover board at the wheel pit to charge respondents with knowledge of and acquiescence therein.

The other cases cited by petitioner, i. e., *Bailey* v. *Central Vermont R. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062; *Pauly* v. *McCarthy et al.*, 109 Utah 398, 166 P. (2d) 501, reversed without opinion, 330 U. S. 802, 67 S. Ct. 962, and *Boston M. R. R. Co.* v. *Meech*, (C. C. A. 1), 156 F. (2d) 109, are all cases which pose the question whether the particular place where the plaintiff was injured was a place of work which the railroad was under a duty to make safe. In each case, it was held that there was sufficient evidence from which it reasonably could be found that the employee had duties and work which he was obliged to perform at the place where he was injured, thereby rendering that particular *locus* a place of work. In the present case on the other hand, the petitioner had no necessary

duties to perform within the area enclosed by the safety chains; under no circumstances was the area ever designed as a place of work for switchmen; by installation of the safety chains the respondents had taken all precautions reasonably possible to warn employees such as petitioner of this obvious fact; and there was no practicable way that respondents could have made the area safe for general use as a passageway, without dispensing with the required use of the wheel pit.

III.

THERE IS NO EVIDENCE THAT PETITIONER FELL FROM THE COVER BOARD BECAUSE OF ANY NEGLEGINCE ON THE PART OF THE RESPONDENTS.

If, as the respondents contend, there is no evidence that they were under any duty to foresee that the petitioner would attempt to squeeze between the guard post and the side of the car spotted over the wheel pit and attempt to cross the cover board within the area surrounded by the safety chains, that of course is conclusive, so far as this case. But regardless of the unforseeability of the accident and injury to the plaintiff, the fact is there was no evidence that the cover board from which petitioner fell was in any respect defective or insufficient.

The evidence is uncontradicted that the particular cover board from which the petitioner fell will fit over the wheel pit at only one place (R. 88). It always remains in place and is never removed (R. 63). The carmen working at the wheel pit need this board at this particular location in connection with their work (R. 58, 74, 85, 87-88). The board fits firmly over the pit (R. 57, 84). It weighs about 75 pounds (R. 88) and is 22 inches wide (R. 57). At each end of the board there is attached a steel lip of Z-iron construction (R. 57-58). The Z-iron is secured by a strap of iron over both the top and bottom sides of the board (R. 57-58). The steel lip fits over the edge of the cement wall of the wheel pit, so as to make it flush

with the top of the ground (R. 58). The board fits snugly in place (R. 58, 75); it has no play or wobble in it (R. 75). It is just a little bit longer than the other boards, so as to make it fit a little tighter because it is used as a brace (R. 74, 87-88).

According to petitioner's own testimony, he crossed the board about an hour and a half before his accident on the same morning (R. 101). At that time he saw grease on the board (R. 39), but it seemed perfectly safe and secure (R. 101). It did not wobble and wasn't infirm; it seemed solid (R. 101). When he started to cross the board on the occasion of his injury, it felt like there was a pebble or rock under it (R. 49). But he didn't see any pebble or rock and didn't examine the board (R. 49). So his statement about a pebble or rock under the board would be just a guess (R. 49). He fell toward the west off the west side of the board (R. 50). As he began to cross he "just glanced at the position of the board" (R. 98). He noticed one little spot of grease, but doesn't know whether he slipped on that particular spot of grease or not at that time (R. 99). He didn't notice that he ever stepped into the grease, or whether he really got into the grease (R. 99). He couldn't swear as to whether his foot slipped in the grease (R. 100). He didn't see any grease on the board before he stepped on it (R. 100).

Hawkins, a carman, who was working at the wheel pit came out of the wheel pit just a few minutes before petitioner was injured (R. 83). He stepped onto the cover board. The board was firm, and free from oil as far as he could see (R. 84). The wheel pit was cleaned regularly about twice a week for the purpose of eliminating grease and oil (R. 90). It was to Hawkins' advantage to keep grease and oil off the board, because otherwise he might take a tumble into the wheel pit himself (R. 90). Up to the time that petitioner was hurt, Hawkins had never seen any oil on the board (R. 93). During the past two years that Hawkins had worked at the wheel pit, he had seen oil on the board once. That was in February, 1946 (R. 92), or approximately eight months *after* the date of Wilkerson's accident. There was a practice of keeping oil

off the board (R. 92), and to Hawkins' knowledge there had been oil on the board only on this one occasion referred to (R. 93). After petitioner's accident the board was in continuous use until August 12, 1916, when it was removed from the wheel pit (R. 60, 93) and brought to Salt Lake as an exhibit in this case.

The complaint filed in this case specifically alleged that respondents were negligent in that they failed to provide a safe or substantial covering over the top of the wheel pit, but on the contrary, caused to be placed over the wheel pit a loose plank which was not firmly set, affixed or attached to the sidewalls of the pit, and that due to insecure fastening and installation of the plank, footing was insecure and infirm and the plank would and did turn and shift as men were walking over it; also that respondents had caused and permitted grease, oil and other slippery substance to accumulate and remain upon the plank, and that as petitioner stepped upon it while crossing over the pit, due to the narrow width of the plank and the grease and oil thereon, he was caused to slip, lose his balance and fall to the bottom of the wheel pit and thereby sustain the injuries complained of (R. 1-5).

It is respectfully submitted that there is not a single one of these allegations which has any evidentiary support. The testimony above set forth demonstrates without contradiction that the cover board over the wheel pit was substantial, firmly set, affixed, attached and secured to the sidewalls of the pit. Petitioner, himself, confirmed this fact when he crossed the board about an hour and a half before his accident (R. 101). His statement, that when he crossed the board at the time of his accident it felt like there was a pebble or rock under the board which caused it to tilt, was admittedly "just a guess" on his part (R. 49). The testimony likewise demonstrates, without contradiction, that grease, oil and other slippery substance had not accumulated or remained on the cover board. At the most, the evidence favorable to the petitioner consists of his own statement that at the time of his accident he "just glanced at the board" and noticed one little spot of

grease. But he didn't know whether he slipped on that particular spot of grease or not (R. 99). The record contains not a shred of testimony to the effect that grease or oil ever had been allowed to accumulate on the board or that it was in any manner defective or insecure.

CONCLUSION

It is submitted that the trial court necessarily and properly granted the respondents' motion for a directed verdict in this case in view of the undisputed physical facts and the uncontradicted evidence. Any other ruling would have required a holding that an employer is an absolute insurer of the safety of his employees under any and all circumstances. The petition for writ of certiorari therefore should be denied.

Respectfully,

WALDEMAR Q. VAN COTT,
DENNIS McCARTHY,
Attorneys for Respondents.